STATE OF CONNECTICUT

SUPREME COURT

S.C. 19797

LYME LAND CONSERVATION TRUST, INC.

vs.

BEVERLY PLATNER

BRIEF OF THE DEFENDANT-APPELLANT

TO BE ARGUED BY:

BRENDON P. LEVESQUE OR
KAREN L. DOWD

BRENDON P. LEVESQUE
KAREN L. DOWD
HORTON, SHIELDS & KNOX, P.C.
90 GILLETT STREET
HARTFORD, CT 06105
JURIS NO. 38478
(860) 522-8338
(860) 728-0401 FAX
BLEVESQUE@HORTONSHIELDSKNOX.COM
KDOWD@HORTONSHIELDSKNOX.COM

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STATEMENT OF FACTS AND PROCEEDINGS

This appeal arises out of a dispute over the interpretation and application of a Declaration of Restrictive Covenant ("the Declaration") that applies to 66 Selden Road in Lyme, Connecticut.[1] In 1981, Paul B. Selden, then-owner of 66 Selden Road, conveyed the Declaration to the Lyme Land Conservation Trust, Inc. ("the Land Trust").[2] (App. at A34). There are portions of the property that are subject to the Declaration, the "Restricted Area", and portions that are not subject to the Declaration, the "Unrestricted Area."[3] (App. at A220). The property at 66 Selden Road is approximately 20 acres. (App. at A405). The Unrestricted area is 4.4 acres and includes, inter alia, the house and the patio. The Restricted Area is approximately 14 acres and includes portions of the woodlands, the meadow, and the beach. (Tr. 3/9/15, pp. 15, 44). The Restricted Area surrounds the Unrestricted Area. (App. at A220). There is no clear visible delineation between the Restricted and Unrestricted Areas on the property. In some sections of the property, the Restricted Area comes within feet of the house.

In this case, the plaintiff, the Lyme Land Conservation Trust, Inc. ("the Land Trust") alleged that the defendant's maintenance and use of the Restricted Area at 66 Selden Road violated the Declaration. The following relevant facts were adduced at a trial to the court, Koletsky, J:

I. THE HISTORY OF 66 SELDEN ROAD AND THE CREATION OF THE DECLARATION.

A. Ownership by the Seldens.

The Selden Road properties were historically used by the Selden family as agricultural farmland. (App. at A465-66). In the 1950s, 66 Selden Road was largely scrub brush with some trees. (App. at A405-06). Almost all of the soils at 66 Selden Road are wetland soils.

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[1]This Declaration is unique in that it does not contain many of the standard restrictions contained in present-day conservation easements. (See App. at A214).

[2]The plaintiff was listed as the Lyme Conservation Trust on the Declaration. (App. at A214).

[3]The Declaration also refers to the restricted area as the "Protected Area." (App. at A214).

(App. at A400). In 1981, Mr. Selden purchased 66 Selden Road from his father. (App. at A404). Because of the wetland status of 66 Selden Road, Mr. Selden hired Attorney Charles Tighe to help him secure permission to build a house. (App. at A408). Attorney Tighe helped Mr. Selden secure such permission by negotiating an agreement with the wetland commission and the Land Trust whereby Mr. Selden agreed to certain conditions with the Land Trust as to the land outside of the house site. (App. at A407).

That agreement was memorialized in the Declaration, (App. at A214), which was drafted primarily by Attorney Tighe and Arthur Howe, President of the Land Trust and the representative of the Grantee's position. (App. at A410-19). Tighe testified that he was told that the wetland agency would not approve the permit unless Mr. Howe approved of the restrictions. (App. at A409). For instance, the Declaration included paragraph 3.1 at Mr. Howe's request. (App. at A413). Tighe testified that Mr. Howe did not ask for the inclusion of any language requiring only native plants, disallowing ornamental shrubs or flowers, encouraging biodiversity, protecting wildlife, or precluding use of fertilizers, pesticides, herbicides, or insecticides. (App. at A414-16). Mr. Howe never discussed restricting mowing, which is expressly allowed by the Declaration. (App. at A416-17). When asked if Mr. Howe discussed limits on trees or shrubs, Tighe testified that "[i]f he were interested in any of these things, he would have told me because he told me about other things that he wanted." (App. at A417).

Usually when the Land Trust assumes ownership of an easement, it has an expert provide a baseline report on the property stating the condition of the property at the time of acquisition, including topography, flora, and wildlife. (App. at A342-43). There is no baseline report for 66 Selden Road. (App. at A343, A354).

B. Ownership by the Lawrences.

Fleur Hahne Lawrence and her husband owned 66 Selden Road from 1997 until 2007. (App. at A272-73). Mrs. Lawrence testified as to four general areas on the property: the lawn,

the meadow, the woodlands, and the beach. When she owned the property, the lawn essentially covered the land from the house to the river. (App. at A268). The lawn had an irrigation system that extended into the Restricted Area. (App. at A220, A277, A426-27). Mrs. Lawrence had the lawn mowed every ten days or so and had the meadow mowed twice a year, once at the end of July and again around Thanksgiving. (App. at A274-75, A82). The meadow is ten acres. (Tr. 3/9/15, p. 15).

The beach, which Mrs. Lawrence described as a lovely sandy beach with dunes, extended approximately 10-15 meters into the property from the waterline, running around the entire front of the property and into the creek for approximately ten meters. (App. at A279-80). During the time Mrs. Lawrence owned the property, she had work done to clean up the beach. (App. at A280-81).

The woodlands cover roughly five and a half acres, are to the south of the house, and are partly in the Restricted Area. (App. at A277, A220, A366-67, Tr. 3/5/15, pp. 102-03). During the time she owned 66 Selden Road, Mrs. Lawrence removed trees from that area because of her concern over beaver activity. (App. at A276-77).

C. Ownership by the Platners.

Mrs. Platner purchased 66 Selden Road from Mrs. Lawrence in May of 2007. (App. at A359). The Platners hired Novak Brothers Landscaping ("Novak Brothers") to take care of the property. (App. at A283-84). As part of their maintenance, Novak Brothers planted flowers, shrubs, and grass throughout the property. (App. at A285-86).

A number of the plants were placed on a hillside in the Restricted Area. (App. at A287-89). Prior to the planting on the hillside, there was bittersweet, poison ivy vines, and pricker bushes, which Mr. Novak believed was an invasive plant called multi-flora rose. (App. at A314-15). Additionally, Novak Brothers regularly mowed the property, sometimes twice a week. (App. at A299-300). They aerated the area north of the house once a year and fertilized the property, including the Restricted Area. (App. at A301, A325-38). On one

occasion, Novak Brothers spread topsoil on some of the meadow and sprayed hydro-seed over the top soil. (App. at A294-97).[4] The main purpose of the hydro-seeding was to repair the grass, including damage due to flooding. (App. at A317-18). The topsoil also helped break down clay, which improved drainage. (App. at A321).

Novak Brothers slice seeded the north field once, which involved slicing the ground about a quarter of an inch and dropping seed into the slices. (App. at A298). The slice seeding was done to add, not replace, grass. Id. Repairs were done to the grass because of construction damage and the relocation of the driveway. (App. at A319-20). Hydro seeding was done in both the Restricted and Unrestricted Areas. Novak Brothers created tree rings around some of the trees, which involved cutting the grass around the tree in order to plant shrubs and flowers. (App. at A290-93). Some of the trees with tree rings were in the Restricted Area. (App. at A292). Additionally, Novak Brothers mowed the woodlands south of the house, generally cleaning up the woods. (App. at A304-05). They did not remove live, healthy trees, only dead ones or ones identified by an arborist as dying. (App. at A322). Novak Brothers removed trash left by prior owners, such as tires, Styrofoam objects, needles, and a gas propane tank. (App. at A323-24, A263). They also regularly removed trash left by flood waters. (App. at A323-24).

Novak Brothers also provided the Platners with 22.5 tons of sand. Mr. Novak testified the sand was used to backfill the blue stone patio.[5] (App. at A306-08). Mr. Platner testified that the sand, requested by the stone masons for the patio, was not deposited on the beach. (App. at A361-63).[6]

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[4]There was no evidence as to where the topsoil was spread. The defendant's expert testified that if the topsoil was spread over a 12 acre field, that topsoil would be 3/10 inch thick. (App. at A475-76).

[5]Nothing in the invoices from the landscapers indicated where the sand was used. (Exs. 36, 37). The patio is in the Unrestricted Area. (App. at A220).

[6]Defendant's expert testified that if 22 tons of sand had been deposited on the beach, which area measures 50' by 150', the additional sand would be a bit less than an inch over the entire area. (App. at A477).

The Platners had other work performed, including having the soil tested by the DEP agricultural station. (App. at A339). They installed a new irrigation system in the field north of the house, which included a portion of the Restricted Area. (App. at A301-03). The existing irrigation system in the meadow did not work. (App. at A364, A368, A426-27).

Lastly, the Platners obtained a permit allowing the removal of invasive species in the Restricted Area of the woodlands and on the lawn. (App. at A428-30). Richard Snarski oversaw the implementation of the Inland Wetlands permit.[7] (App. at A365-66, A263-64). In 2008, Mr. Snarski inventoried the woodlands as to the plant species and number of trees and shrubs, and specifically noted which species were exotic invasives. (App. at A367, A264). Mr. Snarski testified that the exotic invasive plants in the woodland area had become so abundant that the understory was open when all of the invasive plants were removed. (App. at A420-21). He also testified that he did not see any native plant species removed. (App. at A421).

During the inventory, Mr. Snarski discovered a species of special concern, that is, a species with more than ten populations in Connecticut but with a declining population. (App. at A422-23). He informed the Platners of that species, the Beach Leatherleaf, and they made affirmative efforts to move, protect and expand the plant on their property. (App. at A424-25). By the fall of 2014, that species, which had been failing to thrive, was doing well and expanding. (App. at A425).

II. THE DISPUTE WITH THE LYME LAND CONSERVATION TRUST.

George Moore, the Executive Director of the Land Trust and a former steward of 66 Selden Road, testified that the goal of the Land Trust, and the purpose of the Declaration, was to maintain 66 Selden Road in a natural state. (App. at A340-41, A344-45, A347-48). He believed this goal was best achieved by limiting mowing of the meadow to twice a year, yet he

[7]Mr. Snarski is a wetlands consultant with a Bachelor's Degree in soils from the University of Connecticut and a Master's Degree in soil science from the University of Illinois. He is a certified professional soil scientist, certified professional wetlands scientist, and certified professional sediment and erosion control specialist. (Tr. 3/10/15, p. 65).

admitted that there was nothing in the Declaration that limited mowing. (App. at A345-46, A353). Indeed, the Land trust repeatedly recognized that mowing was not limited by the Declaration. (App. at A231, A252).

The Land Trust and the two prior owners of 66 Selden Road entered into separate agreements whereby the prior owners agreed to a bi-annual mowing schedule. (App. at A346, A434, A269). Attorney Gahagan, who represented the Land Trust in this very matter, previously represented the owners of this property. (App. at A221, A243). At that time, he argued that there was no limitation on mowing. Id. His client ultimately agreed to a separate agreement with the Land Trust to mow bi-annually. Id. These agreements were never recorded on the land records, the land conservation records, or the inland wetland records. (App. at A434-36). Despite his prior representation to the contrary, Attorney Gahagan maintained, in this case, that mowing was limited by the Declaration. (App. at A231).

Although Mr. Moore knew that the declaration did not limit mowing, the Land Trust wanted the Platners to adhere to a bi-annual mowing schedule as well. (App. at A437-38, A345, A353). Contrary to the trial court's decision, Mr. Platner did not summarily respond to the Land Trust. (App. at A221-42, A245-60, A267). Rather, the Platners engaged in extensive communications with the Land Trust in an effort to resolve the dispute over the property. Id.

In 2007, the Land Trust claimed that the meadow had been converted into a "lawn." (App. at A352). The Land Trust brought this action seeking injunctive relief. (App. at A34). In the operative complaint, the Land Trust claimed that the manner in which the defendant maintained and improved the Restricted Area violated the Declaration. Specifically, the Land Trust took issue with the relocation of the driveway,[8] construction of a fire department dry hookup, alteration of the conditions of the trees, grasses, and vegetation in the meadow and woodlands, installation of an irrigation system in the Restricted Area, and placement of

[8]Issues regarding the driveway have been resolved by a Stipulation. (App. at A191).

truckloads of dirt in certain areas of the property. (App. at A36-37).[9] The defendant filed counterclaims seeking, inter alia, an interpretation of the Declaration and to enforce the Declaration. (App. at A93-99).

At trial, the plaintiff presented the testimony of Glenn Dreyer, Director of the Arboretum and Executive Director of the Goodwin Niering Center for the Environment. (App. at A372). Concerning the meadow, Mr. Dreyer testified that prior to 2007 it was more of a "natural landscape," predominantly composed of native and non-native grasses but with some broadleaf plants and woody plants, trees, and shrubs that would have been mowed down. (App. at A373-75). He believed the primary difference between the meadow, before 2007 and after 2007, was the species of grass present and the way those grasses grow in the turf. (App. at A378-79).

As to the woodlands, Mr. Dreyer testified at trial that he believed that prior to 2007 the understory would have been mainly native plants but with some exotic invasive shrubs, vines, and soft stem plants. (App. at A376). Mr. Dreyer admitted that it is undesirable, and even detrimental, to have exotic invasive plants in an understory. (App. at A377, A391).

The defendant presented the expert testimony of Katherine Throckmorton, a licensed landscape architect and certified professional in erosion control at Environmental Land Solutions. (App. at A393). Ms. Throckmorton, testified that "scenic" is a broad and subjective term used to describe something composed and pleasing to the eye, which can incorporate natural and manmade elements such as a backyard, a byway, or a highway, but usually encompasses landscape elements. (App. at A397-98). In her opinion, there is a scenic vista from the road to the river on the property at issue. (App. at A399).

As to the meadow, Ms. Throckmorton testified that in July 2014 the plants in the field were a mix of cool season grasses, forbs, clovers, and broad-leafed herbaceous material.

[9]The Connecticut Attorney General was granted intervenor status on May 29, 2013 and filed his own complaint, which repeated the allegations set forth in the plaintiff's complaint. (App. at A34-37, A68-74).

(App. at A395-96). Ms. Throckmorton agreed with Mr. Dreyer that the removal of invasive species was beneficial for the woodland. (App. at A394).

After hearing all of the evidence, the trial court found that (i) the Declaration was not ambiguous; (ii) the defendant deliberately violated "the existing restrictions on the property as set forth in Exhibit 8;" and (iii) the defendant intended to incorporate "the restricted area into the unrestricted area for aesthetic purposes as desired by the defendant without regard to those restrictions."[10] (App. at A114). The trial court summarily denied the claims for relief sought in the defendant's counterclaim. (App. at A115).

The court rendered a written decision which included rulings on damages. (App. at A121-23).[11] At that time, the court noted that "[t]he restriction's purpose, by its terms, is to 'assure retention of the premises predominantly in their *natural, scenic or open condition* . . . ." (App. at A121) (emphasis added). The court, referring to Mr. Platner's testimony about efforts to make the meadow more like a lawn, found "that the defendant's actions were willful and caused great damage to the protected area's *natural condition* which the defendant was obligated to retain." (App. at A121-22) (emphasis added).

The court ordered that the Restricted Area "be restored to the condition it was in at the time defendant acquired the property." (App. at A122). The court also ordered damages of $350,000 under General Statutes § 52-2602(d), referring to evidence that the restoration could take approximately $100,000 to restore and applying a multiplier of 3.5 to that number. Id. The court clearly held that the damages were a fixed sum of $350,000 regardless of what the actual cost of restoration was. Id.

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[10]Despite having stated that the Declaration was not ambiguous, the trial court acknowledged that "[p]erhaps it is not entirely clear if defendant is restricted to mowing her fields only once a year or if she can mow them more often. . ." (App. at A122).

[11]That decision specifically relied on Exhibits 55 and 56. (App. at A268). Exhibit 56 is an exhibit for identification only.

The court also ordered counsel fees, finding that fees could be ordered for counsel who originally undertook his pro hac vice representation on a pro bono basis. The court then ordered a subsequent hearing on how the restoration was to be implemented. (App. at A123). The defendant took an appeal on April 28, 2015. (App. at A196).

III. TRIAL AND HEARING ON RESTORATION.

As noted above, there was no baseline report for 66 Selden Road from the Land Trust. (App. at A343 (as to 2007), A354 (as to 1981)). Mr. Moore, the Executive Director of the Land Trust and former steward of the property, could only testify that between 1981 and 2007 the meadow contained grass and trees. (App. at A344, A355).

At the remediation hearing, the plaintiff's expert, Mr. Dreyer, testified that in 2007 the meadow would have been dominated by native and non-native grasses with primarily warm season grasses and some broad leaf plants. (App. at A442-43). He admitted, however, that nobody knows exactly what species or their ratio were on the property in 2007. (App. at A462). He acknowledged that he had not identified the species on the property when he was there in 2013. (App. at A441).

Mr. Dreyer stated that to restore the meadow to the pre-2007 condition the appropriate solution was to remove or kill the turf and ornamental plantings in the meadow. (App. at A386). He recommended that the Platners use a sod cutter or other heavy machinery to remove the turf, or kill the grass and plants using a chemical treatment, like Round Up, or cover the ten acres of field with black plastic. (App. at A386, A446). Mr. Dreyer recommended that once the existing grasses and plants were removed, native plants would be introduced to the meadow. (App. at A387). In the first year or two, monthly mowing would be needed, but once the desired native plants were established, there would be only yearly mowing. (App. at A388-89). He acknowledged that his plan would require an inland wetland permit and an erosion control expert. (App. at A444-45). Mr. Dreyer admitted that his plan to return the

property to its condition in 2007 did not include putting back the dominant non-native naturalized grasses. (App. at A373-74, A452).

As to the woodlands, he testified that when he visited the property in 2013 the understory, which included an invasive exotic plant called Japanese stilt grass, had been mowed. It was his opinion that regular mowing could potentially destroy the plants in the understory. (App. at A380-85). Therefore, he recommended prohibiting all mowing, except to control the stilt grass. He suggested handling the invasive species on an individual basis. (App. at A390). Mr. Dreyer testified that he was not necessarily trying to reproduce the conditions in 2006 with his proposal. (App. at A392).

Finally, he recommended that the irrigation system be removed from the meadow. (App. at A386-87). He also recommended that sand be removed from the beach, because he assumed it had been placed there. (App. at A447-48).

At the remediation hearing, the defendant's expert, Michael Klein,[12] an environmental consultant, testified that he could not definitively determine what species of grass were present in the meadow or the meadow's condition in 2007.[13] (App. at A463-64). His office performed a 2015 inventory which revealed that at least 51 species were currently present in the meadow. (App. at A468-69). That species diversity was not qualitatively different than what Mr. Klein would have expected in 2007. (App. at A470). In his opinion, to estore the field to what is believed to have existed in 2007, the defendants could simply stop irrigating and fertilizing and only mow twice a year. (App. at A474).

Mr. Klein concluded that there was no benefit in removing the tree rings or removing the ornamental shrubs. (App. at A471). Further, from a wildlife standpoint, he stated that it makes

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[12]Mr. Klein is the principal of Environmental Planning Services. He is an environmental consultant, specializing in the impacts of human activities on the natural environment. Mr. Klein is a biologist and soil scientist by education and a professional wetlands scientist by trade and experience. (App. at A463).

[13]The defendant's other expert, Mr. Allan, also testified that the meadow was almost identical to the field in 2007 when looking at the structure and habitat. (App. at A487-88).

no difference whether the grasses are warm or cold season grasses. (App. at A472). As for the woodlands, the original inventory listed mostly invasive species. (App. at A479). The updated survey found more than 41 species, and nothing needed to be done to that area. (App. at A479-82).

Ultimately, the trial court rendered its order as to three different areas of the property. Concerning the meadow, the court ordered that the Restricted Area "be planted with 'plugs' or similar devices to restore the lawn to a natural state that will not require chemicals to be placed upon these wetlands." (App. at A141). The parties were ordered to submit planting plans. Id. The court also ordered the removal of the heads of the irrigation system and precluded the use of the irrigation system to water the Restricted Area. Id. The tree rings were ordered removed. Id.

As to the woodlands, the trial court ordered that mowing and landscaping in the woodlands would "be discontinued to permit the woodland areas subject to the conservation restriction to return to their earlier natural condition." Id. Selective removal of invasive plants on a plant by plant basis would be allowed but future plantings in the woodlands will have to be approved on a case by case basis during restoration. Id.

As to the beach, the trial court held that "the artificial beach created by defendant in the Restricted Area is ordered to be remediated, and the logs installed in that area are to be removed." (App. at A142). The court enjoined the defendant from mowing during the appeal "beyond a single mowing at this time." Id. The defendant amended her appeal. (App. at A197). The defendant also filed a motion to reargue which was denied. (App. at A143).

The trial court subsequently ordered that the defendant comply with the planting plan submitted by the plaintiff "in order to restore the property to its condition when defendant took the property." (App. at A186). The court at that time also ordered that "[f]urther mowings will be permitted on motion presented to the court, after notice to the plaintiff." Id. The defendant amended her appeal again. (App. at A198).

ARGUMENT

I. THE TRIAL COURT ERRED IN HOLDING THAT THE DEFENDANT VIOLATED GENERAL STATUTES § 52-560a.

This appeal turns on the interpretation of the Declaration filed on the land records that expressly allows certain activity and does not expressly prohibit any of the activity that the court found constituted a violation.[14]

Standard of Review: Plenary. *Autotote Enter., Inc. v. State, Div. of Special Revenue*, 278 Conn. 150, 160 (2006).

The trial court concluded incorrectly that the defendant violated General Statutes § 52-560a and the Declaration. This suit was brought pursuant to General Statutes § 52-560a. The trial court awarded damages to the plaintiff under § 52-560a and ordered restoration to the condition as it existed prior to the defendant's purchase. Section 52-560a provides in pertinent part:

> (b) No person may encroach or cause another person to encroach on open space land or on any land for which the state, a political subdivision of the state or a nonprofit land conservation organization holds a conservation easement interest, without the permission of the owner of such open space land or holder of such conservation easement or **without other legal authorization**.

Id. (emphasis added). In this case, the Declaration is the "other legal authorization" for the defendant to act on the property subject to the easement. That is, if the Declaration permitted the defendant's actions, then there was no violation of the Declaration and therefore no violation of § 52-560a. As noted below, the defendant's action did not violate the Declaration. As there was no violation of § 52-560a, the trial court's decision should be reversed.

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[14]This Court requested briefing on whether the 4/28/15 appeal was from a final judgment. Subsequent to the filing of that appeal, the defendant amended her appeal on 8/6/15 as to the Judgment on 3/12/15 and 3/26/15, the Decision on Motion to Reargue dated 4/16/15, the Decision on Motion for Reargument dated 7/16/15 and Order on 7/17/15. Pursuant to P.B. § 61-9, even if the first appeal was not from a final judgment, the subsequent amended appeal is from a final judgment and cured any jurisdictional defects. The appeal was then amended again on 11/25/15 when the trial court rendered supplemental orders.

II. THE TRIAL COURT ERRED IN ITS INTERPRETATION OF THE DECLARATION.

By its plain language, the Declaration does not prohibit the defendant from engaging in the conduct that the court found was improper. To the contrary, the Article II Reservations expressly provide for mowing, cultivating crops, pasturing livestock, harvesting forest products, and planting flowers, trees, and shrubs.

Standard of Review: "[T]he determination of the intent behind language in a deed, considered in the light of all the surrounding circumstances, presents a question of law on which our scope of review is . . . plenary." *Alligood v. LaSaracina*, 122 Conn. App. 479, 482 (2010). That means that "when faced with a question regarding the construction of language in deeds, the reviewing court does not give the customary deference to the trial court's factual inferences." Id.

The trial court concluded that the Declaration was unambiguous. (App. at A115). The court then erred in the application of the Declaration to the plaintiff's allegations when it concluded that the defendant violated the Declaration by mowing, watering, seeding, or fertilizing the grass in the meadow. The court also erred when it concluded that the defendant violated the Declaration in her maintenance of the woodlands and that the defendant was precluded from planting shrubs and tree rings in the meadow and on the hillside. The trial court's improper interpretation and application of the Declaration also led it to improperly deny the relief sought by the defendant in her counterclaims, which relied on the interpretation of the Declaration.

The court's interpretation of the Declaration is flawed for two reasons. First, it stressed that the restrictions in the Declaration trumped the reservations. Second, it imposed restrictions that were not expressly included in the Declaration. Stated simply, the court improperly enlarged the scope of the Declaration beyond its stated intent.

> The meaning and effect of the [restrictive covenant] are to be determined, not by the actual intent of the parties, but by the intent expressed in the deed, considering all its relevant provisions and reading it in the light of the surrounding circumstances.... The primary rule of interpretation of such [restrictive] covenants is to gather the intention of

> the parties from their words, by reading, not simply a single clause of the agreement but the entire context, and, where the meaning is doubtful, by considering such surrounding circumstances as they are presumed to have considered when their minds met.

Alligood, 122 Conn. App. at 482.

The principles governing the construction of instruments of conveyance are well established. "In construing a deed, a court must consider the language and terms of the instrument as a whole.... *Our basic rule of construction is that recognition will be given to the expressed intention of the parties to a deed or other conveyance,* and that it shall, if possible, be so construed as to effectuate the intent of the parties...." *Wykeham Rise, LLC v. Federer*, 305 Conn. 448, 457 (2012), citing *Bolan v. Avalon Farms Prop. Owners Ass'n, Inc.*, 250 Conn. 135, 140-41 (1999) (emphasis in original).

It is well settled that restrictive covenants, including those that apply to conservation restrictions, are to be narrowly construed and if the language is ambiguous it should be construed against the covenant. *Morgenbesser v. Aquarion Water Co.*, 276 Conn. 825, 829 (2006); *Southbury Land Trust, Inc. v. Andricovich*, 59 Conn. App. 785, 789 (2000) (applying the rule concerning ambiguities equally to conservation restrictions under General Statutes § 47-42a). This is because restrictive covenants are "in derogation of the common-law right to use land for all lawful purposes which go with title and possession." *Pulver v. Mascolo*, 155 Conn. 644, 649 (1967). "[T]he words in a restrictive covenant are to be interpreted in their ordinary and popular sense" unless they "have acquired a particular or special meaning in the particular relationship in which they appear..." *Southbury Land Trust*, 59 Conn. App. at 789.

"In the determination of the meaning in which words in a restrictive covenant are used, the controlling factor, when discovered, is the expressed intent. Intent unexpressed will be unavailing." *Katsoff v. Lucertini*, 141 Conn. 74, 77 (1954). Most importantly, prohibitions must be expressly stated and will not be implied absent a finding that the covenant is ambiguous. Id. at 77-78; *Pulver*, 155 Conn. at 648-49; *5011 Cmty. Org. v. Harris*, 16 Conn. App. 537, 541 (1988).

1. The Reservations Take Precedence Over The Restrictions.

The trial court misinterpreted the Declaration when it treated the restrictions contained in Article I of the Declaration as controlling. The trial court stated: "[w]hat the Court finds is a deliberate violation of the existing restrictions on the property as set forth in Exhibit B." (App. at A115). The court then stated that "the Court finds the intent was to incorporate the restricted area into the unrestricted area for aesthetic purposes as desired by the defendant without regard to those restrictions." Id.

When the Declaration is read as a whole, as it must be, it is clear that, by their express terms, that the Reservations contained in Article II and the Statement of Purpose contained in Article III were intended to limit the Article I Restrictions. Had the trial court properly considered the limiting effect of the Article II Reservations and the Article III Statement of Purpose, it had no other option other than concluding that the Declaration does not expressly prohibit the defendant's conduct. In fact, it expressly permits most of the conduct in question.

Article I contains numerous restrictions.[15] But these restrictions are not absolute and controlling. They are expressly limited by the language of the preface to Article II which states that "*[a]nything in ARTICLE I above to the contrary notwithstanding*, the Grantor reserves to himself and his heirs and assigns the following rights in and upon the protected area." (App. at

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[15] 1.2 No soil, loam, peat, sand, gravel, rock or other mineral substance, refuse, trash, vehicle bodies or parts, rubbish, debris, junk, or other waste material will be placed, stored or permitted to remain thereon.
1.3 No soil, loam, peat, sand, gravel, rock, mineral substance or other earth product or material shall be excavated or removed therefrom.
1.4 No trees, grasses or other vegetation thereon shall be cleared or otherwise destroyed.
1.5 No activities or uses shall be conducted thereon which are detrimental to drainage, flood control, water conservation, erosion control, soil conservation, fish and wildlife or habitat preservation.
1.6 No snowmobiles, dune buggies, motorcycles, all-terrain vehicles or other vehicles of any kind shall be operated thereon.
1.7 Except as may otherwise be necessary or appropriate, as determined by the Grantee, to carry out beneficial and selective non-commercial forestry practices, all woodland thereon shall be kept in a state of natural wilderness.

. . . .

(App. at A214-15).

A215) (emphasis added). This clause means that when there is a conflict between the Article I Restrictions and the Article II Reservations, the Article II Reservations prevail.[16]

The court's interpretation that Article I controls renders the Reservations in Article II meaningless. For example, Article I, § 1.4 states that "[n]o trees, grasses or other vegetation thereon shall be cleared or otherwise destroyed." (App. at A214). If this were the controlling provision, then the reservation of the right in sections 2.1 and 2.2 of Article II to cut, prune, or trim vegetation, plant trees and shrubs, and mow the grass is meaningless because of the language in the Article I restrictions. (App. at A215). For Article II to make sense, it must be read as limiting the restrictions in Article I because all provisions in a contract must be given effect. *Cantonbury Heights Condo. Ass'n, Inc. v. Local Land Dev., LLC*, 273 Conn. 724, 735 (2005).

The meaning of the Declaration is also clarified by a review of Article III, which states that the purpose of the Declaration "is to assure retention of the premises predominantly in their natural, scenic or open condition and in agricultural, farming, forest and open space use and to assure competent, conscientious and effective preservation and management in such condition and use." (App. at A215). Article III provides for keeping of the premises in a "natural, scenic or open condition. . ." (App. at A216). The use of the disjunctive means that the property must meet one, not all, of those provisions. *Flint v. Universal Mach. Co.*, 238

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[16] 2.1 To create and maintain views and sight lines from residential property of the Grantor by the selective cutting, pruning or trimming of vegetation, provided that such action shall not have a significant adverse impact upon the Protected Area.
2.2 To conduct and engage in the cultivation and harvesting of crops, flowers and hay; the planting of trees and shrubs and the mowing of grass; the grazing of livestock; and the construction and maintenance of fences necessary in connection therewith.
2.3 The cultivation and harvesting of forest products in accordance with sound non-commercial forestry practices.
2.4 To maintain, repair, reconstruct and replace any utility poles and associated appurtenances thereto located upon the Protected Areas at the effective date hereof.
2.5 To continue to the use of the Protected Areas for all purposes not inconsistent with the restrictions set forth in ARTICLE I above.
(App. at A215).

Conn. 637, 645 (1996) (use of disjunctive conjunction 'or' unambiguously means either of the items separated by the conjunction apply). The trial court placed all of its emphasis on the "natural" provision of Article III (App. at A121), yet did not explain why making the Restricted Area look like the Unrestricted Area violated this purpose in its entirety. Moreover, Ms. Throckmorton testified that there is a scenic vista from the road to the river on the property. (App. at A399).

The trial court erred in concluding that the totality of the defendant's conduct, the maintenance of the Restricted Area as a lawn and the cleaning up of the woodlands, beach and hillside, violated the Declaration. The Declaration had to be applied as a whole, with proper deference to the Reservations and with regard to the specific conduct alleged.

2. The Trial Court Improperly Added Restrictions That Were Not Expressly Included.

The trial court erred when it inferred prohibitions that were not express. Absent a finding of ambiguity, prohibitions within a Restrictive Covenant must be expressly stated. *Katsoff*, 141 Conn. at 74; *Pulver*, 155 Conn. at 648-49; *5011 Cmty. Org.*, 16 Conn. App. at 541.

The cases interpreting restrictive covenants are determinative in this case. In *5011 Cmty. Org.*, the defendant purchased three lots and intended to build a Burger King on the unrestricted lot and build a parking lot and a drive-through on one of the lots subject to the restrictive covenant. Id. at 539. The plaintiffs alleged that the commercial use was prohibited by the restrictive covenant which stated in pertinent part:

> It is hereby agreed that only one dwelling house shall be erected on said lot either a single or a two-family house, said single house to cost not less than Three-thousand (3000) Dollars, and said two-family house to cost not less than Fifty-five Hundred (5500) Dollars, and that no out building shall be erected upon said lot other than a private garage.

Id. at 540. This Court began its analysis by noting that restrictive covenants must be strictly construed. Based on that statement, this Court concluded that the restrictive covenant only

limited the residential usage of the property and if the restrictive covenant was intended to prohibit commercial usage it would have expressly done so. Id. at 541-42.

In *Pulver v. Mascolo*, 155 Conn. 644 (1967), the plaintiffs argued that because the restrictive covenant indicated that the lot was intended for a single family home, the defendants were prohibited from building an outbuilding on the rear of the lot. Id. at 648. This Court disagreed with the plaintiffs. First, the Court pointed out that the restriction, "expressly prohibits the erection of board fences and chicken coops and the keeping of chickens on the premises. The erection of no other type of building is expressly prohibited." Id. at 648. Second, the Court made it clear that "[h]ad it been the intent of the parties to prohibit the erection of any other building or outbuilding, they would naturally have so specified in this covenant in connection with the prohibition of chicken coops." Id. at 649. See also, *Katsoff*, 141 Conn. at 78 (if the covenant had meant to restrict construction of a billboard it would have been relatively simple to include necessary language). If the parties intended to prohibit specific activities or protect native plants, the prohibitions should be express.

Not only will the Declaration not be enlarged by implication, the plain language of the Declaration cannot be ignored even if there is a sound public policy at issue. In *Morgenbesser v. Aquarion Water Co. of Connecticut*, 276 Conn. 825, 829 (2006), the Supreme Court held that the covenant unambiguously excluded all uses unrelated to water. The defendants, therefore, were unable to use land for a telecommunications tower because its usage did not relate to the primary use of water supply. The Supreme Court held that even though the proposed use might advance the public policy of access to communications it "does not permit this court to ignore the clear and unambiguous language of the restrictive covenant prohibiting such a use." Id. at 832.

In *Alligood*, this Court narrowly construed a restrictive covenant that stated, "[s]aid premises are conveyed subject to a restriction that shall prohibit the erection of a structure or dwelling on that portion of the conveyed premises northerly of the northern face of the

dwelling..." 122 Conn. App. at 480-81. The defendants constructed an addition to the house and a porch on the north side of the house. This Court reversed the trial court and held that "the covenant prohibits construction of *a separate* structure." Id. at 483 (emphasis in original). Nothing in the covenant prohibited the defendants from making an addition to an existing structure. Id. at 482-83.

Prohibitions on the use of the land contained in restrictive covenants must be express, must be read narrowly, and may not be enlarged even in light of a valid public policy. In its March 26, 2015 order, the court held that the Declaration was unambiguous. The trial court ignored the law and the unambiguous language of the Restrictive Covenant by focusing on the purpose of the Declaration, which is to "assure retention of the premises predominantly in their natural, scenic or open condition. . . ." (App. at A121). The stated purpose cannot trump the express language of the Declaration. The defendant did not need to show that the Reservation allowed her to act. The plaintiff needed to show that the Declaration expressly prohibited her conduct. The plaintiff cannot make that showing.

As to the meadow and the hillside, the plaintiff complained that the defendant destroyed the existing grasses and vegetation in the Restricted Area and replaced them with a lawn and ornamental landscaping. (App. at A37). There is no express language in the Declaration setting out any preference for one type of vegetation over another, including native versus non-native. Indeed, Attorney Tighe specifically testified that had such language been requested it would have been included. (App. at A417). Absent express language indicating a preference for certain species, there can be no violation where one grass was added to another.

The court held that defendant violated the Restrictive Covenant when they mowed, seeded, and fertilized the meadow. (App. at A121-22, A141). The Declaration, however, does not expressly prohibit fertilizing or seeding in the Restricted Area. Nor does it prohibit the addition of grasses to the Restricted Area. Absent an express provision saying that the defendant could *not* do those activities, she was permitted to do so. The plaintiff's primary

complaint was about mowing. In response, the court restricted mowing. That flies directly in the face of the Declaration which expressly permits mowing without limitation. There is no express language in the Declaration permitting such an invasion on the defendant's property rights.

In addition, section II permits the conduct engaged in by the defendants. For example, Paragraph 2.2 expressly permits property owners to harvest crops, flowers and hay; plant trees and shrubs, mow the grass, graze livestock, and construct and maintain fences. Likewise, Paragraph 2.5 permits property owners to "continue the use of the Protected Areas for all purposes not inconsistent with the restrictions set forth in Article I above." Therefore, the defendant could remove all existing plant life and replace it with corn, or hay grass, or cacti under the express language of the Declaration, when reading the reservations as paramount to the restrictions, as the Declaration provides. Livestock could have been allowed to graze on any and all of the plants in the Restricted Area. The trial court improperly altered and extended the Declaration by implication when it held that the defendant was precluded from mowing, fertilizing and seeding. *Pulver v. Mascolo*, 155 Conn. 644, 649 (1967).

Finally, as to the meadow, the trial court ordered the removal of the irrigation system. Nowhere in the decision does the trial court say what express restriction prohibited such a system, especially in light of the existing one in place in 2007. There is nothing in the Declaration prohibiting irrigation of the property. There was no violation of the Declaration in the conduct on the meadow.

Concerning the woodlands, the trial court held that the defendant had, "destroyed" the understory. (App. at A141). The testimony made clear that the vegetation in the understory were invasive and undesirable plants. (App. at A478). The defendant obtained a permit to remove those invasives. Moreover, both the plaintiff and the trial court had no issue with the removal of invasives. So the violation is based on the removal of plants that both the plaintiff and the trial court found should have been removed. Indeed, as a result the trial court created

another new restriction by ordering that such plants be handled on a case by case basis, requiring action where none was previously required.

As to the hillside, the defendant removed invasives and planted shrubs. (Tr. 7/15/15 at 112). The removal of invasives cannot be a violation as discussed, and Paragraph 2.2 expressly allows the defendant to plant shrubs and trees. There was no legal basis to find a violation of the Declaration.

As to the finding that the defendant placed the sand on the beach, that finding is baseless, as discussed below in Issue V. Further, to read Paragraph 1.2 as an absolute prohibition against the placement, storage or retention of *any* soil, sand or other mineral substance on the property would be absurd. This Court will not interpret contracts to create absurd results. *Welch v. Stonybrook Gardens Co-op., Inc.*, 158 Conn. App. 185, 198, cert. denied, 318 Conn. 905 (2015). Obviously, this provision was to prevent the landowner from leaving piles of soil or other material on the property. It was not to prevent the use of such substances for landscaping. The spreading of topsoil over portions of the meadow and the placing of logs for erosion prevention cannot be the basis for a violation.

This Court should interpret the language of the Declaration strictly as it and the Supreme Court have done in the past. This Court should reject any attempt to read broadly the words or bring in other understandings to alter the "clear" terms of the agreement. In this case, a close reading serves to protect the property owner from the plaintiff's attempts to restrain certain activities on the land. A strict reading appropriately balances the competing interests of the parties by protecting their legitimate expectations and by not creating restrictions to the defendant's use of the land where none were intended. This Court should reverse the trial court and direct judgment in favor of the defendant on the complaint and order a new hearing on the counterclaims.

III. IF THIS COURT HOLDS THAT THE DECLARATION IS AMBIGUOUS, THE MATTER MUST BE REMANDED FOR A NEW TRIAL.

If this Court determines that the Declaration is ambiguous, then the matter must be remanded.

Standard of Review: "[A]mbiguity permits the trial court's consideration of extrinsic evidence as to the conduct of the parties.... [T]he trial court's interpretation of a contract, being a determination of the parties' intent, is a question of fact that is subject to reversal on appeal only if it is clearly erroneous." *19 Perry St., LLC v. Unionville Water Co.*, 294 Conn. 611, 623 (2010) (internal citations and quotation marks omitted.)

In the alternative, if this Court determines that as a matter of law the Declaration is ambiguous, the determination of the parties' intent must be found as a question of fact. If the meaning of the Declaration is not clear, the trial court is bound to consider any relevant extrinsic evidence presented by the parties for the purpose of clarifying the ambiguity. *Il Giardano, LLC v. Belle Haven Land Co.*, 254 Conn 502, 511 (2000). As the trial court did not render a decision based on the intent of the parties, if the Declaration is ambiguous, the case would need to be remanded on both the plaintiff's claims and on the defendant's counterclaim.

IV. THERE IS NO LEGAL AUTHORITY FOR THE TRIAL COURT'S ORDER OF THE PLANTING PLAN.

Standard of Review: Plenary. *Ammirata v. Zoning Bd. of Appeals*, 264 Conn. 737, 743 (2003) (conducting plenary review over issues of pure law).

A trial court does not have unfettered authority to order any activity on privately owned property. In this case, neither the Declaration nor the statutes provide a basis for the remedy ordered by the trial court.

General Statutes § 47-42c provides that conservation restrictions, such as the Declaration, may be enforced by injunction or proceedings in equity, but provides no guidance for what remedies can be ordered. The Declaration similarly provides no guidance other than an action for breach may be enforced by injunctive relief. (App. at A216). Section 52-560a

sets out the remedy conservation easement holders may seek. Specifically, it provides that "[t]he court *shall* order any person who violates the provisions of subsection (b) of this section to restore the land to its condition as it existed prior to such violation. . ."[17] General Statutes § 52-560a (emphasis added).[18] Absent some provision in statutory law or the Declaration, there is no legal basis for the trial court to create new or different restriction on the use of property or to create a new condition on the property.

In this case, the plaintiff sought injunctive relief restraining the plaintiff from taking certain actions pursuant to § 47-42c or § 52-560a. (App. at A38-39). The plaintiff also sought, pursuant to those same statutes, a permanent injunction against the defendant seeking to "Restore the Platner Property to its condition as it existed prior to the defendant[']s actions as described. . ." (App. at A39).

The trial court stated its remedy in differing ways, to restore it to a natural state, or to its prior condition. Section 52-560a(c) is clear, the remedy, if any, is to return the property to its condition prior to the violation. Here, the trial court rendered orders as to the "restoration" of the property. Concerning the meadow, the court ordered that the Restricted Area "be planted with 'plugs' or similar devices to restore the lawn *to a natural state* that will not require chemicals to be placed upon these wetlands." (App. at A141) (emphasis added). The trial court subsequently ordered that the defendant comply with the planting plan submitted by the plaintiff "in order to restore the property to its condition when defendant took the property." (App. at A186).

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[17]In the alternative the court may award the costs of such restoration to the landowner. General Statutes § 52-560a(c). The court did not do so in this case, and the defendant is the landowner.

[18]Of interest, within that same section, the statute provides that the holder of the conservation easement or the Attorney General "may" bring an action and the court may award attorney's fees, necessarily making clear that the use of shall is intended to be mandatory. "[W]hen the legislature opts to use the words 'shall' and 'may' in the same statute, they must then be assumed to have been used with discrimination and a full awareness of the difference in their ordinary meanings." *Lostritto v. Cmty. Action Agency of New Haven, Inc.*, 269 Conn. 10, 20 (2004) (internal quotation marks omitted).

Concerning the woodlands, the trial court ordered that mowing and landscaping in the woodlands "be discontinued to permit the woodland areas subject to the conservation restriction to return to their earlier natural condition." But the court did not order the replacement of invasive species which had been removed and would require continuing removal efforts. (App. at A141).

Assuming arguendo, there was a violation, the trial court was limited by § 52-560a(c) to an order returning the property to its prior condition. That is not what the trial court did. Instead it ordered the planting of seed or plugs based upon its desire to transform the property into a "natural" state that it thought was more ecologically appropriate. The basis for the order finds its roots in the testimony of the plaintiff's expert, Glenn Dreyer.

Q. But it would have been dominated by --
A. It would have been dominated by both of those groups, warm-season and non-native naturalized species.
Q. *But your plan does not envision putting back any of the dominant non-native naturalized grasses, does it?*
A. *No, it does not.*

(App. at A452) (emphasis added).

Q. Is your only goal in your recommendation -- is your only goal in all of the things you're recommending to the Court to create the 2007 condition or to create a preferable ecological condition?
A. I would say both.

(App. at A453-54).

Q. So, if there were invasives in 2007, are you recommending they be put back in?
A. No.

(App. at A457).

Q. So, to restore this property to the 2007 condition would be to replace the forest with – replace all of these invasive species, would it not?
A. Not in my opinion. You know, it depends on a literal interpretation I think of the Court saying it needs to be in the condition it was in 2007. That depends on how literally you interpret that, I guess, condition.

(App. at A459).

Q. So, to restore the restricted area to its condition in 2007, you would concede, means that we take out what we've managed to increase there; correct?

A. Are you talking about the threatened species?
Q. The hudsonia tomentosa.
A. No, I don't agree that you would take it out.
Q. I didn't say – what I said is to restore it if there's more now than there was then, we'd have to take out some; wouldn't we?
A. I think if you were to follow a very literal interpretation of trying to exactly reproduce the conditions in 2007, then you could argue that.
Q. But isn't not taking the literal one simply a human choice, just like aesthetics?
A. I don't really follow what you're asking me.
Q. Nature isn't making the choice, is it? It's you.
A. What choice?
Q. The choice of not taking out the hudsonia tomentosa, not restoring the invasive species, and putting in the mix that you've put in which is all native or naturalized seed.
A. Yes, those are human choices.

(App. at A460-61).[19]

Contrary to the statute, the plaintiff sought, and obtained, an order that permits the plaintiff to pick which grass, shrubs, and plants would be grown *on the defendant's property*. The order was not designed to and would not restore the property to its pre-violation condition. The order in this case created the environmental setting that the plaintiff would like. It was the plaintiff's obligation to provide the trial court a plan which restored the land to its prior condition, not to the condition the plaintiff desired. See *Ventres v. Goodspeed Airport, LLC*, 275 Conn. 105, 149-50 (2005), cert. denied, 547 U.S. 1111 (2006) (where the plaintiff's plan was one of improvement not restoration, the Supreme Court concluded that the trial court did not have to issue its own restoration plan or order the defendants to restore the property).

There is no basis in the statutes or in the Declaration for the plaintiff to use injunctive relief in this case to achieve a revision of the Declaration. The trial court's restoration orders are improper.

V. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE RESTORATION PLAN ORDERED BY THE TRIAL COURT.

Standard of Review: "To the extent that the trial court has made findings of fact, our review is limited to deciding whether such findings were clearly erroneous. . . . A finding of fact

[19]Defendant's expert, Michael Klein, noted that the only way there could be a "restoration" of the woodlands would be through the planting of invasive shrubs. (App. at A483).

is clearly erroneous when there is no evidence in the record to support it . . . ." *Frillici v. Town of Westport*, 264 Conn. 266, 277 (2003) (internal citations and quotation marks omitted).

1. **The Meadow, The Woodlands, And The Hillside.**

The trial court's order was clearly erroneous because there is no evidentiary basis for the condition of the property as it was in 2007.

The parties put on evidence in response to the trial court's request for a planting plan.[20] The plaintiff's expert Glenn Dreyer only testified generically about the pre-2007 condition of the meadow.

> Q. And what was your opinion regarding what the vegetation was in the field prior to May 2007?
> A. That it would have been dominated by native and non-native grasses, primarily; some warm-season native grasses, and other kinds of native and non-native grass species with less amounts of broad leaf plants, we call them forbs sometimes, things you might call wildflowers. But predominantly native and non-native grasses.

(App. at A442-43).

> Q. You didn't see, in 2007, you didn't see particularly small brush there in your photo, did you; in the photos you looked at in 2007.
> A. No, I couldn't make out anything but the cedars and general brown vegetation I took to be dominated by grasses.
> Q. With some broad leaf forbs, I think you said.
> A. That was an assumption, but not visible in the photographs I don't believe.

(App. at A450-51).

> Q. Again, but you don't know whether the topsoil was used mainly in the unrestricted area or where, if at all, was put in the --
> A. I did not see it placed in any particular location.
> Q. Wouldn't removing the sod remove, likely remove, soil that was already there in 2007?
> A. Yeah, in some cases I'm sure it would.

(App. at A455-56).

Likewise, concerning the woodlands, Mr. Dreyer admitted that he did not know what the condition of the property was in 2007.

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[20]The plaintiff did so while retaining her right to appeal the order requiring the planting plan.

A. I would only assume that if it was solid invasives and nothing else and they removed them all. I don't know what the density of the invasive species were, I don't know what techniques he used to remove them. That's a possible scenario that it was densely full of invasives and then stiltgrass came in after that.
Q. Okay. But not knowing the density of it, you also – you cannot know the probability of other things being removed from the canopied woods, can you?
THE COURT: I'm sorry, are you talking about past, future?
BY ATTY. LAMBERT:
Q. After 2008.
A. After 2008, *I can't know* what was removed; you're right, *I can't know* what was removed.

(App. at A458) (emphasis added).

Finally, Mr. Dreyer testified as follows:

Q. In trying to determine what sort of – I'm sorry, I'm going to start that over. Can we agree that nobody knows exactly what the condition was in terms of what species and their ratio, I'll call it, in 2007?
A. Yeah, I think that's true.
Q. That would be true in the woods and it would be true in the field, right?
A. Right, I know of no actual inventory at that time; that would be the only good evidence of what exactly was there.

(App. at A462).[21] The Trust failed to do an inspection or inventory of property when they took it into the Trust. They also failed to make periodic inspections of the property. The best they could prove at trial is that in the meadow there was "cedars and general brown vegetation." (App. at A450). That is insufficient to prove the condition of the meadow in 2007 such that an order of restoration could be entered.

The defendant put on three experts. All three testified that all that was needed was to "abandon irrigation and resume the prior mowing regime" in order to restore the property to its 2007 condition. (App. at A473 (Klein), A488 (Allen), A489-90 (Cowen)). What is interesting is that all three of the defendant's experts talked in terms of the structure or habitat created by

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[21]Mr. Klein testified that:

Q. Does looking at a photograph showing the field not green change your opinion as to whether there are – there were warm-season grasses in the field?
A. No.
Q. Can you, looking at Exhibit 55, have any reliance that it – that it accurately shows the condition in 2007?
A. No.

(App. at A486).

the meadow, not what specific species of grass or plant should be on the meadow. It would seem that such an approach is in keeping with the broad intent of the Declaration.

As to the woodlands, the only evidence at trial was that pursuant to a permit and supervision, the defendant removed invasive species from the understory. The defendant also cared for a threatened species, allowing it to expand. There was no basis for an order as to the woodlands. Likewise, invasives were removed from the hillside and replaced with shrubs. The trial court erred in ordering restoration as to the meadow, the woodlands and the hillside.

2. The Beach

The lack of evidence to support the Restoration Plan is most obvious as to the beach. The trial court held that defendant violated the Declaration by placing 22.5 tons of sand on the beach. (App. at A122). But the plaintiff failed to prove that 22.5 tons of sand was added to the beach.

Brandon Novak, the defendant's landscaper, and Mr. Platner were the only witnesses to testify about the placement and use of 22.5 tons of sand at 66 Seldon Road. In particular, the plaintiff's attorney elicited the following testimony from Brandon Novak:

Q. On that date, did you sell Mr. and Mrs. Platner 22.5 tons of sand?
A Yes.
Q Do you see the item above it that reads weeded beach and spread sand?
A Yes.
Q Trimmed grapevine, filled bluestone walkway, and trimmed deadwood.
A Yes.
Q Did you put 22.5 tons of sand or thereabouts on the beach and spread the sand?
A No, it says backfilled bluestone walkway.

THE COURT: I couldn't hear you. Say again.
THE WITNESS: It says backfilled bluestone walkway.
THE COURT: Yes, and trimmed deadwood.
THE WITNESS: Mm-hmm.
THE COURT: So your testimony about the sand is what?
THE WITNESS: He's asking me if I put 22 ½ tons of sand on the beach.
THE COURT: Yes, and you said no.

(App. at A306-07).

Mr. Platner corroborated Brandon Novak's testimony about the fate of the sand. He also testified that there was a patio that surrounded the pool and ran the entire length of the house, approximately 200 feet. (App. at A361). Mr. Platner testified that the patio was full of weeds and was sinking. Id. As a result, the Platners hired a stonemason to repair the patio. The stonemason requested the sand in order to repair the patio. Like Mr. Novak, Mr. Platner testified that the sand was used to backfill the patio. He specifically testified that the sand was not spread on the beach as there would be no reason to do that. (App. at A363).

Notably, although the plaintiff's expert testified that the sand on the beach should be removed, he admitted that he did not know if sand had been spread on the beach.

> ATTORNEY LAMBERT: Let's start at the end there, Mr. Dreyer. You actually don't know of your own examination of your own study or testing or anything where any sand was placed on the beach, do you?
>
> GLEN DREYER: No.

(App. at A448-49). The defendant's expert, Mr. Klein, testified that while 22 tons of sand sounds extreme, it was de minimis in terms of a construction project. (Tr. 7/14/15, p. 128). He continued stating that 22 tons of sand, if it was applied to the beach, and there was no evidence that it was, would provide a little less than an inch of cover, and was very unlikely to cover the beach defendant was alleged to have created. (App. at A477).

Nevertheless, despite all of the evidence to the contrary, the court concluded that the defendant had violated the Declaration by spreading 22.5 tons of sand on the beach and ordered remediation.

While the trial court could have found that Mr. Novak and Mr. Platner were not credible regarding the placement of the sand, the trial court could not conclude as a result that the sand was spread on the beach because the plaintiffs did not produce any evidence that the defendant spread the sand on the beach.[22] *State v. Fernandez*, 76 Conn. App. 183, 191, cert.

[22]The plaintiff will likely point to an invoice for the sand to prove that the sand was placed on the beach. A review of that invoice establishes only that the sand was delivered to the premises. (Exs. 36, 37).

denied, 264 Conn. 901 (2003). ("A trier of fact is free to reject testimony even if it is uncontradicted ... and is equally free to reject part of the testimony of a witness even if other parts have been found credible ... It is axiomatic, however, that, in rejecting such testimony, a fact finder is not free to conclude that the opposite is true."). "Drawing logical deductions and making reasonable inferences from facts in evidence, whether that evidence be oral or circumstantial, is a recognized and proper procedure in determining the rights and obligations of litigants, but to be logical and reasonable they must rest upon some basis of definite facts, and any conclusion reached without such evidential basis is a mere surmise or guess." *Paige v. St. Andrew's Roman Catholic Church Corp.*, 250 Conn. 14, 34 (1999) (internal quotation marks omitted.).

It was clearly erroneous for the court to conclude, without any facts in evidence in support of the conclusion, that the defendant placed 22.5 tons of sand on the beach. As a result, the court's order to remediate the beach is erroneous and should be reversed.

VI. THE TRIAL COURT IMPROPERLY ORDERED ATTORNEY'S FEES FOR MATTERS BEYOND THIS LEGAL ACTION

Standard of Review: Plenary. *Traystman, Coric and Keramidas, P.C. v. Daigle*, 282 Conn. 418, 428-29 (2007) (conducting plenary review over questions of the requesting and granting of attorney's fees).

The trial court awarded attorney's fees to the plaintiff. (App. at A122-23). The trial court noted that it would not award counsel fees for a *separate* defamation suit or for fees for pro hac counsel prior to his admission. (App. at A122). But the trial court expressly stated that it would award fees for actions taken by the land trust before the Inland Wetlands Commission and the appeal it took and then withdrew. (App. at A123). The trial court also stated that it would order counsel fees for the declaratory judgment action which was withdrawn by the plaintiff at the same time it amended its complaint. (App. at A122). The defendant objected to the award of those fees. (App. at A202).

Connecticut common law punitive damages refer to "the expenses of bringing the legal action, including attorney's fees, less taxable costs." *Larsen Chelsey Realty Co. v. Larsen*, 232 Conn. 480, 517 n.38 (1995). It does not include expenses incurred for "any former trial." *Vandersluis v. Weil*, 176 Conn. 353, 359 (1978); *Harty v. Cantor Fitzgerald & Co.*, 275 Conn. 72, 93 (2005). The administrative proceedings before the inland Wetlands Commission and the appeal filed in superior court for which the trial court awarded attorney's fees were not an essential precursor to this case. As those expenses were not part of this litigation, nor necessary to bring it, it was error to award attorney's fees for that matter. *Vandersluis* and *Harty* bar the award.

The declaratory judgment action was withdrawn by the plaintiff. Essentially, it was a separate proceeding, no different than the defamation action for which the trial court properly held there could be no attorney's fees award. That the plaintiff chose to amend her action in lieu of the declaratory judgment action, rather than filing a new claim, does not make it a necessary part of the litigation or a predicate to recovery. Further, the trial court permitted the amendment as a matter of administrative convenience (App. at A33), making clear a line between the declaratory judgment action and the action as amended. As with the administrative proceedings, there should be no recovery for a separate proceeding, especially where it was withdrawn by the plaintiff.

The court referred to the Declaration in rendering its order on these exact fees. (App. at A123). The Declaration provides for attorney's fees and costs for an action "to enforce the covenant ..." (App. at A216). But the Declaration specifies that such fees and costs may be awarded "if any relief is granted in favor of the plaintiff in said action..." Neither the administrative proceedings before the Inland Wetland Commission and the subsequent appeal nor the declaratory judgment action were resolved in the plaintiff's favor. The Declaration cannot be the basis for an award of attorney's fees for those matters.

As set forth in Exhibits A and B to the Defendant's Objections to Plaintiff's Claims for Attorney's Fees, the defendant, in reviewing the bills, found fees for the Inland Wetlands matter of $12,045.50. (App. at A213a). The defendant set forth fees for the withdrawn declaratory judgment of $17,946.54. (App. at A213b). The award of fees for both of those matters amounts to just shy of $30,000, a significant error. Because there was no legal basis for the award of legal fees for the Inland Wetland matter or for the withdrawn declaratory judgment action, the order of attorney's fees cannot stand.

VII. WHERE THE TRIAL COURT ADOPTED A RESTORATION PLAN FOR WHICH THERE WAS NO EVIDENCE OF THE COST, THE TRIAL COURT IMPROPERLY AWARDED DAMAGES PURSUANT TO § 52-560a(d).

Standard of Review: Abuse of Discretion. *Elm City Cheese Co., Inc. v. Federico*, 251 Conn. 59, 90 (1999).

General Statutes § 52-560a(d) permits a trial court to "award damages of up to five times *the cost of restoration* or statutory damages of up to five thousand dollars." (Emphasis added). "It is axiomatic that the burden of proving damages is on the party claiming them. . . . Damages are recoverable only to the extent that the evidence affords a sufficient basis for estimating their amount in money with reasonable certainty." *Expressway Associates II v. Friendly Ice Cream Corp. of Connecticut*, 218 Conn. 474, 476-77 (1991) (internal citations omitted).

Here, the trial court imposed a fixed damages award of $350,000.00 under § 52-560a(d). (App. at A122). That award fails for three reasons. First, the award is based in part upon a plan which the trial court affirmatively rejected. Second, the award is a set amount rather than a multiplier of costs, in contravention of the statute. Third, the trial court made no determination of the cost of the remediation subsequently ordered and so cannot use that as a post-hoc basis for the award.

First, the trial court noted in rendering the $350,000 award that there was evidence that restoration would cost $100,000. (App. at A122). The only basis for such a finding is Mr.

Dreyer's assertion at trial that his proposed restoration of the meadow would cost approximately $100,000.00. (App. at A389). The trial court "imposed a multiple of 3.5 to that amount." (App. at A122).

At trial, Mr. Dreyer testified that the appropriate solution to remediate the meadow was to remove the grass and the ornamental plantings. (App. at A386). He recommended that the defendant could use a sod cutter or other heavy machinery to remove the turf or kill the grass and plants using chemicals or by covering it with black plastic. (App. at A386, A444-46). The trial court noted its concern about potential additional damage to the area in the restoration process, specifically noting that while the simplest way to proceed may be to cover the area with black plastic, the court was not sure there were not more efficient or effective methods. (App. at A116). As a result, at the same time the court based its multiplier award on the cost of Mr. Dreyer's plan, the trial court ordered a hearing on the manner of the restoration of the property. (App. at A117).

The trial court did not adopt the restoration plan Mr. Dreyer proposed at trial. The trial court also did not adopt the plan proposed by Mr. Dreyer at the restoration hearing four months later. Instead, the trial court expressly rejected Mr. Dreyer's more environmentally damaging proposals, such as using heavy machinery to remove the meadow's turf or chemicals to kill the grass and plants, in favor of using "plugs" to restore the meadow. (App. at A141). As a result, the trial court could not have relied on the $100,000 figure as the basis for its damages award.

Section 52-560a(d) requires the court to use the cost of restoration as the baseline for awarding damages. Permitting a trial court to order damages based on an estimation of the cost of restoration that has no connection to the actual cost of the restoration plan adopted by the court contravenes the plain language of the statute. The award of $350,000 was an abuse of discretion.

Second, the award is really a set amount rather than a multiplier of costs, in direct contravention of the clear language of the statute. "[I]t is the order of the court that this

damage award be a fixed sum (or if the statute requires a precise multiplier, such a multiplier that will result in damages of $350,000.00)." (App. at A122). The trial court is clear about its desire to award a set amount divorced from the actual cost of remediation. The statute, however, does not provide for the award of damages on such a basis. It requires a multiplier applied to costs incurred.

The following illustrates the court's error. If the restoration plan actually adopted by the trial court in this case, if implemented, costs less than $70,000, then the trial court exceeded its statutory authority under the plain language of § 52-560a(d) by awarding $350,000 in damages because that amount is more than five times the cost of restoration, and five is the maximum multiplier. The award of a set amount was error.

Finally, the trial court made no determination of the cost of the remediation subsequently ordered and so cannot use that as a post-hoc basis for the award. The record is devoid of any evidence concerning the actual or approximate cost of remediating the meadow with in line with the trial court's order. Absent evidence as to the cost of the remediation plan that was adopted, there is no viable basis for the damages award of $350,000. See, e.g., *Expressway Associates II*, 218 Conn. at 476-77 (holding that the plaintiff was not entitled to additional damages, or a hearing on additional damages, where it failed to present any evidence on the factors that would have entitled it to more than nominal damages).

Any of the reasons above establish that the trial court abused its discretion when it ordered $350,000 in damages pursuant to § 52-560a(d). If the order finding violations of the Declaration still stands, then the matter should be remanded for a new hearing on the damages to be granted, if any.

CONCLUSION

If this Court agrees with the defendant that the trial court erred in holding that the defendant violated General Statutes § 52-560a or that the trial court misinterpreted the Declaration then this Court should direct judgment for the defendant, and order a new hearing on the counterclaims. If this Court concludes that the Declaration was ambiguous then the matter must be remanded for a new trial. If this Court agrees with the defendant that the trial court improperly ordered the restoration of the Restricted Area or that the trial court lacked sufficient evidence to support the restoration plan, then this Court should direct judgment on those issues. If this Court finds the defendant violated the Declaration, but agrees with the defendant that the trial court improperly ordered attorney's fees because the fees included matters beyond this action, the Court should direct judgment for the defendant. Finally, if this Court finds that the defendant violated the Declaration, but agrees with the defendant that the trial court improperly ordered $350,000 in damages, this court should remand the matter for a new hearing on damages.

DEFENDANT
BEVERLY PLATNER

By _____

Brendon P. Levesque
Karen L. Dowd
HORTON, SHIELDS & KNOX, P.C.
90 Gillett Street
Hartford CT 06105
(860) 522-8338
(860) 728-0401 Fax
blevesque@hortonshieldsknox.com
kdowd@hortonshieldsknox.com

CERTIFICATION

Pursuant to Practice Book § 67-2(h), I hereby certify that: (1) the electronically submitted brief and appendices were emailed on April 13, 2016, to counsel of record listed below; and (2) that the brief and appendices do not contain any names or personally identifiable information that is prohibited from disclosure or that any such information has been redacted.

Pursuant to Practice Book § 67-2(i), I hereby certify that: (1) in compliance with Practice Book § 62-7, a copy of the foregoing brief and appendices were mailed, postage prepaid, to **The Honorable Joseph Q. Koletsky**, and the counsel of record listed below on April 13, 2016; (2) that the brief and appendices are true copies of the brief and appendices filed electronically pursuant to Practice Book § 67-2(g); (3) that the brief and appendices do not contain any names or personally identifiable information that is prohibited from disclosure or that any such information has been redacted; (4) and that the brief complies with all provisions of Practice Book § 67-2(i).

Attorney Tracy M. Collins
Waller, Smith & Palmer P.C.
52 Eugene O'Neill Drive
New London, CT 06320
860-442-0367/Fax 860-447-9915
tmcollins@wallersmithpalmer.com

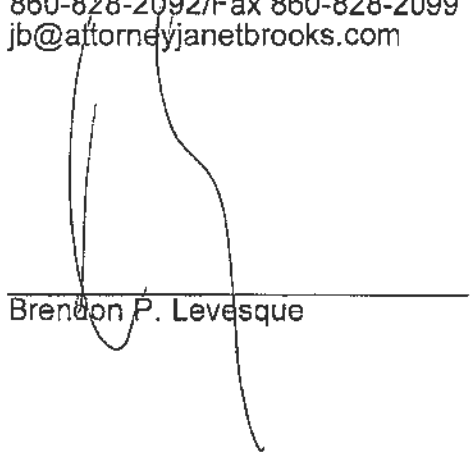
Attorney John F. Pritchard (pro hac vice)
Pillsbury, Winthrop, Shaw, Pittman
1540 Broadway
New York, NY 10036
212-858-1000/Fax 212- 858-1500
johnfpritchard43@gmail.com

Attorney General George C. Jepsen
Gary W. Hawes AAG
Karen Gano, AAG
Attorney General's Office
P.O. Box 120
Hartford, CT 06141
860-808-5020/Fax 860-808-5347
gary.hawes@ct.gov; karen.gano@ct.gov

Attorney Santa Mendoza
111 Huntington Street
New London, CT 06320
860-447-3994/Fax 860-447-3102
santamendoza@comcast.net

Attorney John R. Lambert
25 Trumbull Place
North Haven, CT 06473
203-234-8121/Fax 203-234-8123
johnrlambert@gmail.com

Attorney Janet P. Brooks
1224 Mill Street
Building B suite 212
East Berlin, CT 06023
860-828-2092/Fax 860-828-2099
jb@attorneyjanetbrooks.com



Brendon P. Levesque

CERTIFICATION

Pursuant to Practice Book § 67-2(h), I hereby certify that: (1) the electronically submitted brief and appendices were emailed on October 20, 2016, to counsel of record listed below; and (2) that the brief and appendices do not contain any names or personally identifiable information that is prohibited from disclosure or that any such information has been redacted.

Pursuant to Practice Book § 67-2(i), I hereby certify that: (1) in compliance with Practice Book § 62-7, a copy of the foregoing brief and appendices were mailed, postage prepaid, to **The Honorable Joseph Q. Koletsky**, and the counsel of record listed below on October 20, 2016; (2) that the brief and appendices are true copies of the brief and appendices filed electronically pursuant to Practice Book § 67-2(g); (3) that the brief and appendices do not contain any names or personally identifiable information that is prohibited from disclosure or that any such information has been redacted; (4) and that the brief complies with all provisions of Practice Book § 67-2(i).

Attorney Tracy M. Collins
Waller, Smith & Palmer P.C.
52 Eugene O'Neill Drive
New London, CT 06320
860-442-0367/Fax 860-447-9915
tmcollins@wallersmithpalmer.com

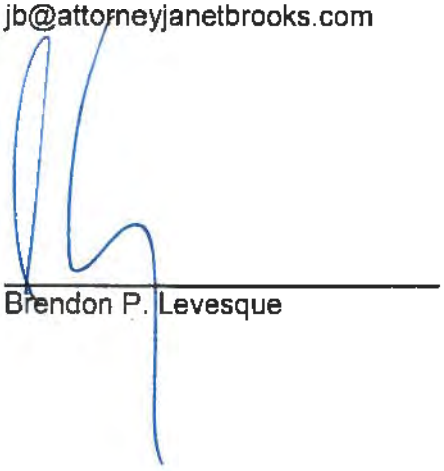
Attorney John F. Pritchard (pro hac vice)
Pillsbury, Winthrop, Shaw, Pittman
1540 Broadway
New York, NY 10036
212-858-1000/Fax 212- 858-1500
johnfpritchard43@gmail.com

Attorney General George C. Jepsen
Gary W. Hawes AAG
Karen Gano, AAG
Attorney General's Office
P.O. Box 120
Hartford, CT 06141
860-808-5020/Fax 860-808-5347
gary.hawes@ct.gov; karen.gano@ct.gov

Attorney Santa Mendoza
111 Huntington Street
New London, CT 06320
860-447-3994/Fax 860-447-3102
santamendoza@comcast.net

Attorney John R. Lambert
25 Trumbull Place
North Haven, CT 06473
203-234-8121/Fax 203-234-8123
johnrlambert@gmail.com

Attorney Janet P. Brooks
1224 Mill Street
Building B, Suite 212
East Berlin, CT 06023
860-828-2092/Fax 860-256-8214
jb@attorneyjanetbrooks.com



Brendon P. Levesque